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The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea

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[A] certain lawyer stood up, and tempted him, saying, Master, what shall I do to inherit eternal life?

He said unto him, What is written in the law? how readest thou?

And he answering said, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy strength, and with all thy mind; and thy neighbor as thyself.

And he said unto him, Thou hast answered right: this do, and thou shalt live.

But he, willing to justify himself, said unto Jesus, And who is my neighbour?

And Jesus answering said, A certain man went down from Jerusalem to Jericho, and fell among thieves, which stripped him of his raiment, and wounded him, and departed, leaving him half dead.

And by chance there came down a certain priest that way: and when he saw him, he passed by on the other side.

And likewise a Levite, when he was at the place, came and looked on him, and passed by on the other side.

But a certain Samaritan, as he journeyed, came where he was: and when he saw him, he had compassion on him.

And went to him, and bound up his wounds, pouring in oil and wine, and set him on his own beast, and brought him to an inn, and took care of him.

And on the morrow when he departed, he took out two pence, and gave them to the host, and said unto him, Take care of him; and whatsoever thou spendest more, when I come again, I will repay thee.[1]

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1. *Luke* 10:25-35 (King James).

> With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have, prevented or relieved.[2]

INTRODUCTION

The schooner *Emblem*, with a crew of six and five passengers, sailed from Apalachicola, Maine, for Havana, Cuba on March 18, 1840.[3] As dawn broke one week later, she was struck by a squall.[4] This storm knocked her on her beam-ends, where she wallowed for eight hours.[5] Finally, when the waterlogged sails snapped her masts, she righted herself.[6] The storm pelted the ship continually, as the wind sent waves crashing over the deck.[7] The crew and the passengers lashed themselves to the stubs of the masts or to the hatches to keep from being washed overboard.[8] For four straight days,

> the weather was boisterous, and the waves constantly broke over the wreck and the heads of the persons on board, so that they were constantly kept wet, lashed to the wreck . . . and without food or drink . . . . [O]ne after another of this sad company, as their strength became exhausted and the powers of nature failed, were loosened from their holdings and washed into the deep. The master of the vessel expired in the evening after the disaster, and five others, before they were relieved.[9]

One of the four survivors, a Mrs. Judah, "saw her husband and her two children successively swept from the deck, by the violence of the waves, and buried in the ocean."[10] Eventually, the *Charles Miller* came to the *Emblem*'s rescue and saved those who were left.[11]

What is most tragic about this case is that it all took place within sight of land, in one of the busiest shipping

2. Buch v. Amory Mfg. Co., 44 A. 809, 810 (N.H. 1898).
3. *See* The Emblem, 8 F. Cas. 611, 611 (D. Me. 1840) (No. 4434).
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *Id.*
10. *Id.*
11. *See id.*

lanes in the country.[12] While the crew and passengers of the *Emblem* suffered, ships constantly passed within sight. Mrs. Judah

> saw five vessels pass them on the first day, and seven on the second; and was informed by one of the crew, that twenty-three, in all, were in sight, at different times, from the wreck .... Some of them came so near, that the persons on board could be plainly and distinctly seen ....[13]

Not one came to their relief.[14]

The callousness of these passersby might offend our sense of morality. We may feel a duty to help our fellow man when he is at risk for his life. We may honor those who do rescue those in danger. But do we feel comfortable holding someone criminally or civilly liable for not coming to the aid of one in need? Can we imprison someone for not being a Good Samaritan?

Under the common law, the answer is no. Traditional tort principles refuse to impute liability to an individual merely for failing to help a stranger. There must be some kind of relationship between the two for duty to inure. Under admiralty law, however, it appears that we can hold someone liable for the injuries caused by a refusal to aid. Title 46, Section 2304 of the United States Code states that "[A] master or individual in charge of a vessel shall render assistance to any individual found at sea in danger of being lost ...."[15] The statute imposes a maximum penalty of two years in prison or a fine of $1000, or both, for its violation.[16] This Note will trace the origin of this statute and examine how the courts have interpreted it.

This statute has a dubious parentage—there is no precedent for it in admiralty law or in common law. Moreover, despite the statute's lack of ambiguity, courts have proved very reluctant to impose this duty on masters or their owners. It has not been amended since its passage in 1912.[17] Scholars rarely examine it, and it is not enforced.

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12. *See id.* at 612.
13. *Id.* at 611.
14. *See id.*
15. 46 U.S.C. § 2304 (1994).
16. *See id.*
17. Although the statute was slightly modified in 1983, there was no change to its substance. *See* 46 U.S.C.S. § 2304 (1998).

Unknown, unprecedented, unenforced. The law of the Good Samaritan is a statute lost at sea. Like an abandoned vessel adrift on the ocean, this derelict law may be a hazard to navigation.

THE LEGISLATIVE HISTORY OF THE STATUTE

In 1885, on the initiative of the Belgian government, the first international congress dedicated to commercial law was held in Antwerp.[18] This congress, and its successor in 1888, dealt with, among other things, the admiralty subjects of salvage and collisions.[19] Consequently, the *Comite Maritime International* was founded in 1897.[20] The *Comite* organized two further conferences, one in Paris in 1900 and one in Hamburg in 1902.[21] At these conferences, the representatives drafted two conventions, one relating to salvage, the other relating to collisions.[22] During four sessions beginning in Brussels in 1905 through 1910, these drafts were debated and amended.[23] Finally, on September 23, 1910, the delegates, including those from the United States, signed the final version of the Salvage Convention.[24]

Article 11 of the Convention read as follows:

> Every master is bound, so far as he can do so without serious danger to his vessel, her crew, and her passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost. The owner of the vessel incurs no liability by reason of contravention of the above.[25]

On January 30, 1912, a bill was introduced in the Senate by Senator Burton that would give effect to the treaty.[26] That bill returned from the Senate Foreign Relations Com-

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18. *See* INA H. WILDEBOER, THE BRUSSELS SALVAGE CONVENTION: ITS UNIFYING EFFECT IN ENGLAND, FRANCE, GERMANY, BELGIUM AND THE NETHERLANDS 1 (1965).

19. *See id.*

20. *See id.*

21. *See id.*

22. *See* Alex L. Parks, *The 1910 Brussels Convention, The United States Salvage Act of 1912, and Arbitration of Salvage Cases in the United States*, 57 TUL. L. REV. 1457, 1457-58 (1983).

23. *See id. at 1458.*

24. *See id.*

25. WILDEBOER, *supra* note 18, at 266.

26. *See* Steven F. Friedell, *Compensation and Reward for Saving Life at Sea*, 77 MICH. L. REV. 1218, 1247 n.98 (1979).

mittee on March 12, 1912, without amendment.[27] On April 10, an identical bill was introduced in the House, except this bill provided for a lower penalty for masters who fail to save life at sea.[28]

On April 15, 1912, the *R.M.S. Titanic* struck an iceberg in the North Atlantic and sank.[29] Over 1500 lives were lost.[30] The public outcry over the tragedy was intense, and there were widespread calls for reform of shipping. As a result, on April 18, 1912, to speed the legislative process, the Senate amended its bill to conform to the House bill, and it passed both houses without debate over its substance.[31] On July 31, 1912, the bill was signed by the president and became law.[32]

The final version of Article 11 was codified as follows:

> The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew, or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so, he shall, upon conviction, be liable to a penalty of not exceeding $1,000 or imprisonment for a term not exceeding two years, or both.[33]

This was slightly modified in 1983, with no change in substance:

> (a) A master or individual in charge of a vessel shall render assistance to any individual found at sea in danger of being lost, so far as the master or individual in charge can do so without serious danger to the master's or individual's vessel or individuals on board.
>
> (b) A master or individual violating this section shall be fined not more than $1,000, imprisoned for not more than 2 years, or both.[34]

In the rush toward passage, most legislators assumed that the Treaty was not in conflict with American law.[35] As

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27. *See id.*
28. *See id.*
29. *See id.* at 1218.
30. *See* MICHAEL DAVIE, THE TITANIC, THE FULL STORY OF A TRAGEDY 1 (1986).
31. *See* Friedell, *supra* note 26, at 1247 n.98.
32. *See* Parks, *supra* note 22, at 1462.
33. 46 U.S.C. § 728 (1982).
34. 46 U.S.C. § 2304 (1994).
35. *See* Parks, *supra* note 22, at 1458.

one author notes, "In the United States, it was felt that the provisions of the Convention were in general accordance with existing law."[36] In terms of property salvage, that is true.[37] In terms of life salvage, however, this Convention—specifically in Article 11—violated some longstanding assumptions about the rights and duties of American citizens.

By imposing an affirmative obligation on sailors to rescue those in peril, this statute runs counter to the resilient tort distinction between misfeasance and nonfeasance. Furthermore, there is no precedent for this law in American admiralty. While many decisions recognize a moral duty to help those in need, these decisions refuse to transform that duty into a legal one. Nor can precedent be found for this obligation in British admiralty, which is assumed to mirror our own.

While the legislators silently approved the Salvage Act in response to the public pressure following the *Titanic* tragedy, they ignored several hundred years of British and American decisions disavowing the duty of one stranger to rescue another. That ignorance may have been intentional. What politician would have the temerity to argue for the right to let people drown in the wake of the *Titanic*?

THE GOOD SAMARITAN AND THE COMMON LAW

The common law does not impose liability for failing to act the Good Samaritan. The most frequently cited case for this principle is *Buch v. Amory Manufacturing Co.*, a New Hampshire Supreme Court decision.[38] The plaintiff, an eight-year old boy, was brought by his older brother to work at the defendant's mill.[39] The 13-year-old hoped to teach his brother how to do the job of a "back boy" in the mill.[40] The court concluded that the eight-year-old was in the mill without permission,[41] even though the defendant's overseer was aware of the child's presence as Buch had been working the mill for two days.[42] The overseer did ask him to leave, but the child spoke no English and did not understand the

36. *Id.*
37. *See* Friedell, *supra* note 26, at 1240-43.
38. 44 A. 809, 812 (N.H. 1898).
39. *See id.* at 809.
40. *See id.*
41. *See id.*
42. *See id.*

request.[43] While retrieving bobbins and picking up garbage, he put his hand in the gears of a spinning machine.[44] His hand was horribly mangled.[45] He sued the mill and lost.[46] The court found that the mill had violated no duty owed to the child:

> The defendants are not liable unless they owed to the plaintiff a legal duty which they neglected to perform. With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have, prevented or relieved. Suppose A., standing close by a railroad, sees a two year old babe on the track, and a car approaching. He can easily rescue the child, with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death.[47]

The reason for this coldness toward the child's injury is the age-old distinction in the common law between misfeasance and nonfeasance. Misfeasance is a harm created by the conduct of the defendant. Nonfeasance is a harm unrelated to any act of the defendant. For example, it may be misfeasance to punch your neighbor in the nose. But it would be nonfeasance merely to allow a stranger to punch that same nose.

> The reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.[48]

Misfeasance and nonfeasance require different relation-

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43. *See id.*

44. *See id.*

45. *See, e.g.*, NAN GOODMAN, SHIFTING THE BLAME: LITERATURE, LAW, AND THE THEORY OF ACCIDENTS IN NINETEENTH-CENTURY AMERICA 101 (1998) (discussing Buch's accident and displaying a photograph of another boy who was similarly crippled by the loss of fingers in an industrial accident).

46. *See Buch*, 44 A. at 811.

47. *Id.* at 810.

48. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 339 (4th ed. 1971).

ships between the parties for liability to be imposed. "Liability for 'misfeasance' may extend to any person to whom harm may reasonably be anticipated as a result of the defendant's conduct . . . ."[49] For liability to attach to nonfeasance, however, there must be a "definite relation between the parties, of such character that social policy justifies the imposition of a duty to act."[50] For example, the courts have found liability to flow from the relationship between a shopkeeper and a business visitor, between a social host to his guest, and between a headmaster and his students.[51]

In the absence of such a relationship, nonfeasance, or the refusal to act, has not been punished.

> Because of this reluctance to countenance 'nonfeasance' as a basis of liability, the law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger, even though the outcome is to cost him his life.[52]

Two cases illustrate courts extending this prohibition to cases on the water not tried under admiralty. In *Osterlind v. Hill*,[53] the defendant rented the decedent a canoe, even though the decedent was visibly intoxicated.[54] Out in the middle of Lake Quannapowitt, the canoe overturned.[55] The decedent hung on the canoe for 30 minutes, calling loudly for help.[56] Hill heard the cries for help, but ignored them.[57] Osterlind drowned.[58] The court sustained demurrers dismissing the charges, because the defendant, who rented a canoe to a drunken man, violated no duty he owed to a stranger.[59] Similarly, in *Yania v. Bigan*,[60] the defendant en-

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49. *Id.* According to Justice Cardozo's equation, "[T]he orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty . . . . The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." Palsgraf v. Long Island R. Co., 162 N.E. 99, 100 (N.Y. 1928).

50. PROSSER, *supra* note 48, at 339.

51. *See id.* at 342.

52. *Id.* at 340.

53. 160 N.E. 301 (Mass. 1928).

54. *See id.* at 302.

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. 155 A.2d 343 (Pa. 1959).

ticed the decedent to jump into a water-filled trench to help him start a submersible pump.[61] Bigan then watched as Yania drowned.[62] The court said, "[t]he mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position."[63] Since he did not push Yania in the water, Bigan was clear of liability. "The complaint does not aver any facts which impose upon Bigan legal responsibility for placing Yania in the dangerous position in the water and, absent such legal responsibility, the law imposes on Bigan no duty of rescue."[64]

While the common law does not impose a duty to rescue strangers, it does require that a Good Samaritan who decides to help must act with care. If one initiates a rescue, one may become liable for injuries that ensue. "Where performance clearly has been begun, there is no doubt that there is a duty of care."[65] This duty of care is that the rescuer must do all that is reasonable once he undertakes a rescue. For example, once someone begins to pull a drowning man out of the water, that person is not free to walk away merely because of a change of mind. That would make the drowning man suffer more, and "[i]f there is no duty to come to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which make his situation worse."[66]

The leading case on the duty of due care is *Indian Towing Co. v. United States*.[67] The plaintiff in that case operated a tugboat that ran aground on Chandeleur Island in Mississippi.[68] The tug was towing a barge full of triple super phosphate, which flooded with seawater in the accident, ruining the cargo.[69] Plaintiff charged that the United States Coast Guard was negligent in maintaining the lighthouse on

61. *See id.* at 344.
62. *See id.* at 346.
63. *Id.*
64. *Id.*
65. PROSSER, *supra* note 48, at 346.
66. *Id.* at 343.
67. 350 U.S. 61 (1955).
68. *See id.* at 62.
69. *See id.*

Chandeleur Island.[70] Due to this negligence, the light was out on the night of the accident. The plaintiff was not aware the light was out and relied on its availability for navigation. The lack of light led the tug to run aground.[71]

Justice Frankfurter, writing for the majority, found that the Coast Guard was negligent, that a duty was owed to the plaintiff, and that the United States was liable under the Federal Tort Claims Act.[72] Justice Frankfurter based his decision on the duty of care:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning.[73]

The individual need not undertake a rescue, but once he does, he had better do everything in his power to succeed. "The result of all this is that the good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing."[74]

THE GOOD SAMARITAN AND ADMIRALTY LAW

Despite the claims of Congress that the duty imposed by 46 U.S.C. § 2304 did not alter existing law, in truth, American admiralty never imposed a duty to rescue. On the contrary, several decisions discussed this lack of legal duty and sought ways to encourage captains to rescue those in need.

A. *The Good Samaritan and Salvage*

This duty to rescue those in peril at sea falls under the

70. *See id.*
71. *See id.*
72. *See id.* at 69-70.
73. *Id.* at 69.
74. PROSSER, *supra* note 48, at 344.

general rules of salvage.[75] "Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict, or recapture."[76]

"There are three prerequisites to eligibility for a salvage award."[77] First, there must have been a danger at sea "from which the ship or other property could not have been rescued without the salvor's assistance."[78] Second, the salvor's act "must be successful in saving, or in helping to save, at least a part of the property at risk."[79] Third, "the salvor's act must be voluntary—that is, he must be under no official or legal duty to render the assistance."[80]

The successful salvor receives a generous reward in light of the fundamental public policy at the basis of awards of salvage—the encouragement of seamen to render prompt service in future emergencies. The reward is not mere quantum meruit—that is, recompense for work and labor done. "Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation."[81]

In considering the worth of the salvor's efforts, the trial judge evaluates "what might be called the moral aspects of the salvage service."[82] This aspect of the salvage award determination is peculiarly within the discretion of the trial judge.[83] "[I]t goes without saying that in passing on the

75. *See* GUSTAVUS H. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 709 (1939).

76. The Blackwall, 77 U.S. (10 Wall.) 1, 12 (1869).

77. Ross A. Albert, *Restitutionary Recovery for Rescuers of Human Life,* 74 CAL. L. REV. 85, 112 (1986).

78. GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 534-35 (2d ed. 1975).

79. *Id.* at 535.

80. *Id.*

81. *The Blackwall*, 77 U.S. (10 Wall.) at 14.

82. GILMORE & BLACK, *supra* note 78, at 562.

83. *See id.* The classic American formulation of the factors used in determining a salvage award is as follows: (1) The labor expended by the salvors in rendering the salvage service; (2) The promptness, skill, and energy displayed in rendering the service, and the danger to which such property was exposed; (3) The value of the property employed by the salvors in rendering the service,

moral worth of a salvage service the trial judge is operating on plastic material which he can shape to suit his own fancy."[84]

The difficulty with traditional salvage law, however, is that only marine *property* is subject to the law of salvage.[85] There is no compensation given to those who save only lives. A clear articulation of this principle is in the English case of *The Zephyrus*,[86] where the salvors saved the crew of the stranded vessel. The ship, and all her cargo, was lost.[87] The majority held that life salvage, in the absence of any salvage of property, could bring no reward.[88] This decision stands today. As Dr. Lushington said in *The Zephyrus*, "The jurisdiction of the Court, in salvage cases, is founded upon a proceeding against property which has been saved, and I am at a loss to conceive upon what principle the owners can be made answerable for the mere saving of life."[89] A court later held, "One reason for this state of the law was, that no property could be arrested applicable to the purpose. There could be no proceeding *in rem*, the ancient foundation of a salvage suit."[90]

The same principle was articulated in 1840 by the American decision, *The Emblem*.[91] The rescuer, the *Charles Miller*, saved those who were still alive and turned immediately for shore.[92] As the weather subsided, however, her captain, George M. Hatch, returned to the wreck to see if any of the cargo could be saved.[93] He found two trunks, one containing theatrical costumes, the other containing over $500 in specie and over $8000 in other negotiable instruments.[94] District Judge Ware stated the rule of life salvage:

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and the danger to which such property was exposed; (4) The risk incurred by the salvors in securing the property from the impending peril; (5) The value of the property saved; (6) The degree of danger from which the property was rescued. *See id.*

84. *Id.*
85. *See* ROBINSON, *supra* note 75, at 712.
86. 166 Eng. Rep. 596 (1842).
87. *See id.* at 596.
88. *See id.* at 597.
89. *Id.*
90. The Fusilier, 16 Eng. Rep. 19, 21 (1865).
91. 8 F. Cas. 611 (D. Me. 1840) (No. 4434).
92. *See id.* at 612.
93. *See id.*
94. *See id.*

> [A] court of admiralty has no authority to allow a reward merely for the saving of life. That, as is observed by Lord Stowell, "must be left to the bounty of individuals. But when it is connected with the preservation of property, then the court can take notice of it, and it is always willing to join that to the animus displayed in the first instance."[95]

Because the *Charles Miller* saved some cargo along with the hapless crew, she was able to partake of a share of the reward.[96] Had she not turned around, however, and merely saved their lives, she would have been barred from collecting any compensation for her services.[97] This was echoed in 1859 in *The Mulhouse*:

> Compensation for saving life, except the life of a slave unconnected with the saving of property, is left by the law to the voluntary bounty of individuals. Indeed, if no property is saved, no means are supplied by which the court can reward the salvor. A suit in personam for salvage for saving the life of a free person, would be a novelty and probably could not be maintained, unless under very special circumstances, of an express contract.[98]

The would-be rescuer is thus left in a predicament. For saving life, he is given nothing but the gratitude of those he saves. For rescuing property, he is allowed up to half the value of what he recovers. In approaching a vessel in distress, then, he needs to decide whether to follow the prompting of his heart or the prompting of his purse. There is a natural temptation to save property first and look

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95. *Id.* (citation omitted).

96. *See id.* at 614.

97. *See id.*

98. 17 F. Cas. 962, 967 (S.D. Fla. 1859) (No. 9910) (citations omitted). It is sadly ironic that the legal definition of slaves as property made them more likely to be saved than others if found at sea. For example, in *Bass v. Five Negroes*, the court granted salvage to a captain who found some escaped slaves suffering at sea:

> It appears that these five negroes had been driven out to sea in a canoe, and that they were picked up by Captain Bass . . . about sixty leagues from land. They were destitute of provisions and water, and, according to the account given by the negroes, had been so for four days . . . . The canoe and negroes may be valued at three thousand dollars . . . . I shall be satisfied with decreeing one tenth. Let Captain Bass be paid that sum; and let the owner of the negroes pay the costs, as it appears that they stole the canoe.

2 F. Cas. 1006, 1007 (D.S.C. 1803) (No. 1093). Had they been free, however, no salvage would have been given to Captain Bass.

around for survivors later.[99] As a result, both the United States and Britain have altered their laws of salvage to compensate those who save both property and lives, and those who save lives while another vessel saves the property. Great Britain, under the Merchant Shipping Act of 1894, created a fund to reward those who rescue lives in the absence of other salvage.[100] The principle remains, however, in American law, that there can be no salvage award for saving life in the absence of saving property.

Besides demonstrating the prohibition against granting awards for saving life, the salvage cases also indicate serious reservations about imposing a legal duty to save those in peril. Often, the judges chafe at their inability to reward mere life salvors because they feel such rewards would encourage the selfish toward altruism. Judge Ware, in *The Emblem*, made his anger at this constraint palpable:

> [I]n the present case, there are some circumstances which, I am free to say, have struck my mind with considerable surprise. They are, that this vessel should have lain, for four days, in one of the most frequented parts of the American seas, with vessels continually passing her, some of them almost within hailing distance, and when they were in full view of this unhappy company, who were lying thus lashed and dying upon the wreck, and no one came to their relief until more than half of their number were released from their sufferings, by death, and consigned to a watery grave. It is a fact, which would seem to be incredible, if it did not rest upon indubitable and unsuspected proof. If this fact is to be taken as a just measure of the humanity of the persons who frequent those seas, I know not but it may be the part, not only of humanity, but of worldly wisdom, to let them understand that sometimes even in

99. *See* GILMORE & BLACK, *supra* note 78, at 572 ("[I]t is still far more profitable to save property than to save lives."). In fact, one judge thought that this tension, between saving bodies and saving lives, was the reason behind 46 U.S.C. § 2304.

> The statute, I think, presupposed possibly a divided interest, and probably a sordid interest, in the average salvor. It imposed penalties of fine or imprisonment, or both, upon the master or person in charge of a vessel who failed, so far as he could do so without serious danger to his own vessel, crew, or passengers, to render assistance to any person who was found at sea in danger of being lost. It also aimed to stimulate, or excite, at least as much effort to save human life as ordinarily would be spent in saving vessel or cargo. It is a sad reflection to contemplate this law.

In re St. Joseph-Chicago S.S. Co. The Eastland, 262 F. 535, 539-40 (N.D. Ill. 1919).

100. *See* ROBINSON, *supra* note 75, at 718 & n.28.

> godliness there is gain, and to tempt them by the allurements of pecuniary profit, if they can be led by no other, to acts of humanity and mercy.[101]

Judge Ware knew of no legal duty for those passing ships to rescue those suffering on the *Emblem*. Instead, he hoped the "allurements of pecuniary profit" would encourage others to help those in need. Greed may succeed where charity fails.

B. *The Good Samaritan and Deviation*

Further evidence that there was no duty to rescue under traditional admiralty can be found in the doctrine of deviation in marine insurance.

A marine insurance policy is a contract between an assured, usually the ship, and an assurer, usually a corporation.[102] "[T]he assured agrees to pay a premium, and the assurer agrees that, if certain losses or damage occur to certain interests of the assured, at risk in a marine venture, the assurer will indemnify the assured."[103] The policy can cover the vessel, the cargo, or some other marine subject matter.[104]

Most marine insurance policies are secured through brokers, who are agents of the assured and who are compensated by a cut of the premium paid to the underwriter.[105] The first step is for the broker to draft the policy, filled out to the specifications of the assured, and present that policy to the underwriter.[106] The underwriter can decline the risk entirely, or he can name his premium and any special conditions he demands.[107] Once they agree to terms, the policy is signed and becomes a binder, which, once sealed, becomes a perfected policy.[108]

That policy "may cover the risks of a single designated voyage, or may insure [the ship] for a period of time."[109]

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101. 8 F. Cas. 611, 612-13 (D. Me. 1840) (No. 4434).
102. *See* GILMORE & BLACK, *supra* note 78, at 56.
103. *Id.*
104. *See id.* at 57.
105. *See id.* at 56-57.
106. *See id.* at 57.
107. *See id.*
108. *See id.*
109. *Id.*

Cargo is almost always insured for the voyage, since that is its natural life at sea.[110] To deter fraud and "welcome" disasters at sea, the policy also usually requires that the assured have an "insurable interest" in the items covered by the policy.[111] The English Marine Insurance Act states,

> [A] person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto . . . .[112]

The nexus between the Good Samaritan and the marine insurance policy is in the doctrine of deviation. Any deviation in a voyage can make the policy void.

> In voyage policies, the assurer is deemed to have intended to accept only that risk that inheres in the expeditious prosecution of the voyage by the usual commercial route. Where the vessel without excuse departs from this route, or delays unreasonably in pursuing the voyage, the policy is ousted. The contract of insurance, once ousted by a deviation, is gone forever; return to the proper course does not restore it.[113]

Courts have held that any unexpected conduct by a master may constitute a deviation.

> As applied in admiralty law, the term 'deviation' was originally and generally employed to express the wandering or straying of a vessel from the customary course of the voyage, but in the course of time it has come to mean any variation in the conduct of a ship in the carriage of goods whereby the risk incident to the shipment will be increased . . . .[114]

That makes the owner of the ship liable for any damage that may ensue to cargo, whether through negligence or not. He, in effect, becomes the insurer for anything covered under the voided policy. "Deviation in the maritime law means a wilful or negligent variation in the conduct of the undertaking as well as a roundabout course. Its effect is to

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110. *See id.* at 57-58.

111. *See id.* at 59.

112. Marine Insurance Act, 1906, 6 Edw. 7, ch.41, § 5 (Eng.).

113. *See* GILMORE & BLACK, *supra* note 78, at 66 (footnotes omitted).

114. G.W. Sheldon & Co. v. Hamburg Amerikanische Packetfahrt Actien-Gesellschaft, 28 F.2d 249, 251 (3d Cir. 1928).

deprive the vessel of the protection of contractual and statutory exemptions."[115]

Stopping to rescue someone lost at sea could very easily be deemed a deviation from the voyage and could, therefore, render a policy void. For a captain carrying a cargo of perishables, every minute and every ounce of fuel counts. The inevitable delay caused by a rescue or salvage operation could spoil his cargo, eliminate his profit through increased fuel costs, and make him liable to the cargo owners for their loss of goods. Such a danger would worry the most altruistic captains. More worrisomeis the language in *Niles-Bement-Pond Co. v. Dampkiesaktieselskabet Balto*:

> [A] failure to carry as required by the terms of the bill of lading, or a deviation of the voyage gives the shipper the right to consider the goods as converted by the deviator, and the ship responsible for damages due to breach of the contract of carriage, without any reference to the question of whether the deviation had any bearing on the particular loss complained of . . . .[116]

The Good Samaritan who stops to save life may in fact find himself branded as one of the thieves.

American courts, however, have consistently refused to allow policies to be voided because of life salvage. One of the earliest is Justice Washington's opinion in *Bond v. The Cora*.[117] The captain of the *Ceres* salvaged the *Cora*, which had been abandoned at sea.[118] The owner of the cargo being shipped on the *Ceres* wanted part of the salvage award.[119] He claimed that the rescue was a deviation, that the contract on the cargo was void, and that he was without protection had the *Ceres* failed to reach port.[120] For that risk, he demanded a share in the spoils.[121] Justice Washington denied his claim, saying there was no deviation:

> [T]he general definition of the deviation is, a voluntary departure from the course of the voyage insured, without necessity or reasonable cause; and I recollect no case, where the justification is not essentially connected with the motive of safety to the property in-

115. ROBINSON, *supra* note 75, at 532.
116. 282 F. 235, 237 (2d Cir. 1922).
117. 3 F. Cas. 838 (D. Penn. 1807) (No. 1621).
118. *See id.* at 839.
119. *See id.* at 840.
120. *See id.*
121. *See id.*

> sured. If the object of the deviation be to save the life of a man, I will not be the first judge to exclude such a case from the exceptions to the general rule. The humanity of the motive, and the morality of the act, give it a strong claim to indulgence . . . .[122]

But Justice Washington refused to grant that same indulgence to one who stops for property only: "If the stoppage be continued, or the risk increased, by adding to the cargo, diminishing the crew, or by other means, for the purpose of saving the property found, I think the underwriters are discharged."[123]

What is important about Justice Washington's opinion is that he never indicates that the captain of the *Ceres* was under a legal duty to stop and check on the *Cora*.[124] The reason for this omission is simple: there was no such duty. Early American admiralty law recognized no legal duty to rescue those in need. The Court took pains to prevent an insurer from imposing deviation for the saving of life. Had there been a duty to save life, no discussion would have been necessary. This is borne out by Justice Story's circuit opinion in *The Boston*[125] where he builds on Justice Washington's decision.

The schooner *Boston* was on her way from Baltimore to Portland, Maine with a cargo of flour, corn, and feathers.[126] In the dark of night, she was run over by another schooner and began filling with water.[127] The crew abandoned her in the ship's longboat.[128] They soon came across the *Magnolia*.[129] She too had just been in a collision, and she was leaking badly.[130] The crew of the *Boston* boarded the *Magnolia*.[131] At dawn, they could see that the *Boston* was still afloat.[132] They tied her to the *Magnolia*, and she was towed

122. *Id.*
123. *Id.*
124. *See generally id.*
125. 3 F. Cas. 932 (D. Mass. 1833) (No. 1673).
126. *See id.* at 935.
127. *See id.*
128. *See id.*
129. *See id.*
130. *See id.*
131. *See id.* It is unclear whether the same vessel struck both ships and sailed on, or if the *Magnolia* and the *Boston* themselves collided. The latter seems the most plausible.
132. *See id.*

safely into Boston harbor.[133] The *Magnolia*'s crew and master sued the owner of the *Boston* for a salvage award for their efforts.[134] Though it is merely dicta, Justice Story laid the groundwork for duty:

> Beyond all question, at least in my opinion, it was the duty of the master of the Magnolia to interrupt his voyage for the purpose of taking on board the crew of the Boston in their suffering state, for the safety of their lives. It was a duty thrown on him by the first principles of natural law, the duty to succour the distressed; and it is enforced by the more positive and imperative commands of Christianity. The stopping for this purpose could not, in my judgment, be deemed by any tribunal in Christendom a deviation from the voyage, so as to discharge any insurance, or to render the master criminally or civilly liable for any subsequent disasters to his vessel occasioned thereby. *But beyond this there was no supervening or imperative duty.*[135]

While there may be a moral duty to aid those in need, a moral duty that begs the indulgence of the court to waive the deviation penalty, there was no legal duty to rescue. As Justice Story says, "there was no supervening or imperative duty."[136] The power of Story's rhetoric betrays his intent: because there was no legal duty to rescue, the court had to warn underwriters that pigheaded enforcement of contracts would not be tolerated. If the law could not mandate altruism, it could at least allow it to flourish.

This reluctance to enforce altruism under marine insurance, however, continued well into the twentieth century. Further evidence that there was no duty to rescue in American admiralty law by the date of the Brussels Convention are two provisions in the Carriage of Goods by Sea Act of 1936[137] and the Harter Act of 1893[138] relating to insurance. Both acts contain provisions about "deviation" and life saving. Both specifically prohibit insurance companies from charging deviation to those vessels that stop to rescue life.[139]

According to the common law of contracts, a contract

133. *See id.*
134. *See id.* at 933.
135. *Id.* at 935 (emphasis added).
136. *Id.*
137. *See* 46 U.S.C. §§ 1300-1315 (1998).
138. *See* 46 U.S.C. §§ 190-195 (1998).
139. *See* ROBINSON, *supra* note 75, at 533.

that violates the law will not be enforced. For example, one cannot make a binding contract to commit murder.[140] If there were a legal duty to rescue those lost at sea, any marine insurance policy that forbade rescue by reason of deviation, in derogation of that legal duty, would be void on its face. Justices Story and Washington did not void the policies—they chose merely not to call the rescue a deviation. Importantly, neither in *The Boston* nor in *Bond v. The Cora* was cargo spoiled in any way. It is uncertain how the justices would have ruled if the rescues had led to financial losses for the cargo owners. What is certain is that there was no legal duty to rescue before the Brussels Convention. Such a duty would have made the language of the Harter Act and the Carriage of Goods at Sea Act superfluous. No insurance policy that contemplated violation of a legal duty would be enforceable in a court of law.

THE ADJUDICATION OF THE GOOD SAMARITAN STATUTE

Cases examining 46 U.S.C. §2304 are rarely reported. Dead men tell no tales. Nor do they sue. Only those castaways who survive, and who can identify a passing ship, would be able to sue the ship's captain for leaving them behind. A decedent's family would have little means of discovering which ships may have passed by a loved one. Nonetheless, there are cases on the books, and the leading case examining the duty to rescue is *Warshauer v. Lloyd Sabaudo*,[141] argued before the Second Circuit in 1934.

Warshauer and a friend set out one October afternoon in 1931 in a motorboat. The engine failed, and they drifted farther and farther out into the Atlantic. They had no food.[142] The defendant was an Italian Corporation, which owned several steamships. One of these came within hailing distance of the plaintiff.[143] Warshauer displayed a recognized signal of distress and requested the steamer come to his assistance.[144] "The defendant's servants on said steamer, particularly its operating personnel, clearly ob-

140. As one court said, "If the conditions of the statute were made for the benefit of the public . . . an agreement is void that does not comply with the [statute] . . . ." Bowdoin v. Alabama Chemical Co., 79 So. 4, 5 (Ala. 1918).

141. 71 F.2d 146 (2d Cir. 1934).

142. *See id.* at 146.

143. *See id.*

144. *See id.*

served his signals of distress, but refused to heed them or to stop and take the plaintiff aboard, although they could have done so without peril to themselves or their vessel . . . ."[145] Two days later, the plaintiff was rescued by a Coast Guard cutter.[146] "In the meantime and in consequence of the exposure and deprivations to which he was subjected by the failure of the defendant's steamship to render the requested aid, the plaintiff suffered permanent physical injuries . . . ."[147]

At trial, "[t]he question chiefly debated was whether the common law or the law of the sea recognizes the existence of a legal duty coextensive with the universally admitted moral duty to rescue a stranger from peril, when this can be done without risk to the one called upon for help."[148] The circuit court abandoned this question: "This interesting problem we pass by as unnecessary to the decision."[149] Instead, the court framed the issue in different terms:

> The precise issue is whether a shipowner is liable for damages to a stranger in peril on the high seas to whom the ship's master has failed to give aid. This situation, it may be noted, involves no personal dereliction of a moral duty by the person sought to be held to respond in damages.[150]

The question, much to the plaintiff's dismay, became one of respondeat superior. The fault was the master's, not the owner's, and "moral obliquity is not imputed to one personally innocent."[151] As a result, the plaintiff lost his case and collected no damages.[152] Though the court did recognize that the plaintiff had established a cause of action against the master, such an action would do nothing for his injuries. Only the well-financed coffers of the owner could make the plaintiff whole.

This decision established 46 U.S.C. § 2304 as valid and binding. One of the plaintiff's arguments was that he should not be bound by the plain language of the statute,

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145. *Id.*
146. *See id.* at 146-47.
147. *Id.* at 147.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *See id.* at 148.

which absolved the owner of criminal liability.[153] He claimed that the treaty was invalid because some of its provisions were not enacted by the legislature.

> It is further urged that the treaty is not self-executing, that article 11 is no more than expression of policy and by the very terms of article 12 requires legislation to carry into effect, and that Congress in enacting such legislation dealt only with the criminal liability of the master, leaving untouched the civil liability of both master and owner, so that no implication can be drawn, either from the treaty or the statute, that civil liability does not exist.[154]

The court scotched this argument and established the treaty as the law of the land. "As a declaration of the views of the great maritime nations, the treaty needs no 'implementation' by legislation."[155]

The next case to interpret the statute was *The Lillian E. Kerr v. Publicover*.[156] The *Lillian E. Kerr*, a four-masted schooner, was en route from New York to Halifax with a load of coal on November 12, 1942.[157] She had all her sails set, but made little headway.[158] No moon was visible, and the skies were overcast.[159] It was a quiet night on the schooner, just north of Cape Cod.[160] With the exception of the watchstanders, the crew was asleep below decks.[161]

Heading toward the *Kerr* was the steamship *Alcoa Pilot*, part of a convoy heading south from Halifax to New York.[162] There were eight ships in the convoy, steaming in four columns of two ships each.[163] To the outside of the columns were three Canadian corvettes, serving as anti-submarine pickets.[164] The *Alcoa Pilot* was the lead ship in the far left column.[165] Behind her was the *Rita*, another

153. *See id.*
154. *Id.*
155. *Id.*
156. 71 F. Supp. 184 (S.D.N.Y. 1947), *aff'd sub nom*, Publicover v. Alcoa S.S. Co., 168 F.2d 672 (2d Cir. 1948).
157. *See id.* at 186.
158. *See id.*
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.* at 186.
163. *See id.*
164. *See id.*
165. *See id.*

steamship bound for New York.[166] None of these ships displayed the running lights required by maritime law.[167] The North Atlantic in 1942 was a killing field for shipping. German U-Boats still had the upper hand in the battle for the sea, and the United States Secretary of the Navy had suspended the navigation rules, such as running lights, to protect the convoys carrying vital war supplies.[168]

The *Kerr*, however, did display her lights.[169] The watch officer on the *Alcoa Pilot* saw those lights but did nothing to warn the schooner.[170] Nor did he change course to avoid collision. The *Alcoa Pilot* struck the *Kerr* on her starboard side, near the bow, and cut the schooner in half.[171] In five minutes, the ship sank to the bottom of the ocean.[172] After the collision, following the standing orders of the convoy, the *Alcoa Pilot* adjusted her course to stay within her column.[173] She did nothing to search for potential survivors from the *Kerr*.[174] The ship astern of the *Alcoa Pilot*, the *Rita*, heard the screams and pleadings of the crew of the *Kerr*.[175] The *Rita* assumed that the screams were from the victims of some ship torpedoed by the Germans, and the standing orders of the convoy were to stay in formation and not come to those in need.[176] Such altruism, it was felt, would risk giving the U-boat more victims. The men of the *Kerr*, thrown from their sleep into the icy Atlantic, could see the steamships looming near them. They could even see the faces of the watch standers looking at them from the bridge. No one did anything to help the men in the water. Not a ship slowed, no one threw a life ring or life vest over the side, and no one radioed the shore. All hands on board the *Lillian E. Kerr* were lost.[177]

The victims' families sued the *Alcoa Pilot* in admiralty under the Stand-by Act for negligence, both in causing the

166. *See id.*
167. *See id.*
168. *See id.* at 188.
169. *See id.* at 186.
170. *See id.* at 186-87.
171. *See id.* at 186.
172. *See id.*
173. *See id.* at 186-87.
174. *See id.* at 189.
175. *See id.*
176. *See id.*
177. *See id.* at 186.

collision and in refusing to aid the survivors.[178] The *Alcoa Pilot* impleaded the *Rita* and the rest of the ships in the convoy for refusing to come to the aid of the survivors.[179] The *Alcoa Pilot* based its claim on 46 U.S.C. § 2304 (formerly § 728).[180]

The federal district judge, in his decision, ignored the statutory duty of § 2304.[181] Instead, he hid behind the rules of the Stand-by Act,[182] which required only a ship involved in the collision to search for survivors: "[I]t shall be the duty of the master or those in charge of each vessel, insofar as he can do so without serious danger to his own vessel, to stay by the other vessel and to render such assistance as may be practical and necessary . . . ."[183] As neither the *Rita* nor the other ships were involved in the collision, it had no duty to assist. Moreover, in the judge's opinion, the demands of the war trumped all other navigation rules. "The Congress had authorized the waiver of compliance with the Navigation Laws upon request of the Secretary of the Navy to such extent and manner as he finds necessary in the conduct of the war . . . ."[184] These were codified in a series of rules for the conduct of convoys. These provided that

> rear ships, unless they receive orders to the contrary, are to act as rescue ships and are to proceed to the assistance of any vessel in their respective column which may be damaged by normal marine risk, such as a collision or man overboard. The duty of the rear vessel is specifically confined to the assistance of vessels forming a part of its own column."[185]

That duty, to save only those that are part of the convoy, holds precedent over a general duty to rescue. It was then

178. *See id.* at 189.
179. *See id.* at 186.
180. *See id.* at 187.
181. The judge did not address the issue of whether the other ships in the convoy had a duty to rescue. There was no question that the *Rita* and the other vessels knew there were men in the water. "They did hear shouts off on her starboard side some 300 feet away, but thought that there had been a torpedoing somewhere ahead and the shouts came from survivors adrift in a lifeboat or on a raft." *Id.* at 189. Because of the dangers of U-boats, they decided not to act. "[S]ubmarines might be nearby, and that pursuant to convoy orders they should hold to their station and not get separated from the convoy." *Id.*
182. 33 U.S.C. § 367 (repealed 1983).
183. *Lillian E. Kerr*, 71 F. Supp at 189.
184. *Id.* at 188.
185. *Id.* at 189.

widely known that U-boats waited for rescue ships to come to the aid of torpedoed vessels, and the safest option, until sonar became widely used, was to stay away from wrecks. In time of war, then, there is no duty to rescue someone in distress at sea. The men of the *Lillian Kerr* were left to the sea, even though there were no reports of submarines in the area, even though their cries were heard from several ships, and even though the convoy was just barely out of sight of land.

After the war, the courts began to interpret the statute more broadly, allowing it to embrace a wider notion of duty and to change the fundamental ideas of life salvage. The most liberal of these decisions is the *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*[186]

The *Overseas Progress*, an American flag tanker owned by defendant, was en route from Haifa to Baltimore when a crewman suffered a heart attack.[187] The *Overseas Progress* did not have a doctor aboard, but guided by the ship's medical books and radio advice from the Public Health Service, her officers attempted to care for the stricken man.[188] When he had another attack the next day, the master of the *Overseas Progress* radioed for any vessel in the vicinity that had a doctor aboard.[189] The nearest vessel to respond was the *Canberra*, a British passenger vessel owned by Peninsular & Oriental Steam Navigation Company.[190] She was en route from Dakar to New York. She had a maximum speed of 25 knots and was equipped with her own hospital and medical personnel.[191] The *Overseas Progress* sent a second message to the *Canberra* requesting a rendezvous to transfer the crewmember.[192] At that point, the *Overseas Progress* was 740 miles from the nearest hospital in Newfoundland.[193] The *Overseas Progress*, a vessel of 13,000 gross tons with a maximum speed of about 13.8 knots, could not have reached there in less than 57 hours.[194] The *Canberra*, by increasing her normal speed to 25 knots, was able to affect the rendez-

186. 553 F.2d 830 (2d Cir. 1977).
187. *See id.* at 832.
188. *See id.*
189. *See id.*
190. *See id.*
191. *See id.*
192. *See id.* at 832-33.
193. *See id.* at 833.
194. *See id.* at 832-33.

vous in 6 ½ hours.[195] After the transfer was made, the *Canberra* resumed her course to New York, still at 25 knots, and arrived there only two and one half hours later than scheduled, though she had to travel an additional 232 miles to save the life of the crewman.[196]

Although Overseas Oil, as owners, paid *Canberra*'s surgeon for services rendered, it refused to pay Peninsular & Oriental for the expenses incurred due to the extra distance traveled at increased speed.[197] The district court granted summary judgment to Overseas Oil, based on the traditional rule that there could be no award for pure life salvage where there was no simultaneous recovery of property.[198]

The Court of Appeals, although critical of this traditional doctrine, avoided the issue of life salvage. It granted restitution to the *Canberra* not because of life salvage, but because the ship assumed the *Overseas Progress*'s duty of maintenance and cure of its crewmember.[199] "Through her expeditious intervention, the *Canberra* performed the *Overseas Progress*'s duty to Turpin [the stricken sailor], far more swiftly and more efficiently than it could have been carried out by the *Overseas Progress*. In such circumstances, the principles of 'quasi-contract' require recovery."[200]

The court acknowledged the common law bias against Good Samaritans:

> Although the law ordinarily frowns on the claims of a 'mere volunteer,' there is a class of cases where it is imperative that a duty be performed swiftly and efficiently for the protection of the public or an innocent third party, in which a 'good Samaritan' who voluntarily intervenes to perform the duty may receive restitution for his services. This rule has become crystallized in the doctrine that performance of another's duty to a third person, if rendered by one qualified to provide such services with intent to charge for them, is a ground for recovery in quasi-contract.[201]

The court also acknowledged that its decision violated the traditions of salvage law.

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195. *See id.* at 833.
196. *See id.*
197. *See id.*
198. *See id.*
199. *See id.* at 834.
200. *Id.*
201. *Id.*

> In admiralty, a person who rescues property at sea may obtain an award based not merely on the costs he incurs but on the value of the property saved and the degree of danger encountered. These rules are designed to encourage seamen to render valorous service in the salvage of property, and remuneration has accordingly been liberal. Yet it seems to have been admiralty law that rescuing lives at sea, rather than property, merited moral approbation, but no pecuniary reward .... But, we do not find the rule on pure life salvage, regardless of its dubious vitality, relevant to the facts. [Peninsular & Oriental] is not seeking a reward; it merely requests reimbursement for its expenses.[202]

Once again, a court ignored the substance of the statute for its spirit. Even though the distinction between finding Turpin floating in a raft and saving him and finding him near death on a ship and saving him is a fine one, the courts seem loathe to enforce the statute. By the letter of the law, the *Canberra* had a duty to save Turpin: "A master ... shall render assistance to *any* individual found at sea in danger of being lost."[203] The statute does not differentiate between those floating in the water and those suffering on a ship. Where someone is in danger for his life, aid must be given. The *Canberra* had no choice; she must rescue Turpin. Under traditional salvage, she could share in the salvage award for any property saved along with the life. But since no property was saved with Turpin, there could be no reward. The Court of Appeals, however, allowed the *Canberra* to collect a reward, or at least a quantum meruit, for doing something she was required to do by law. Had there been a legal duty to rescue, the *Canberra* could expect no compensation. Since the court hesitated to hold the *Canberra* bound by the affirmative duty to rescue, it chose instead to ignore the entire issue and found the decision in quasi-contract.[204] This reflects the real hesitation courts seem to experience at imposing an affirmative duty on individuals. Had this taken place on land rather than in the Atlantic, the *Canberra* would have received nothing:

> On land the person who rushes in to save another's property from danger is an officious intermeddler, the volunteer whom even eq-

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202. *Id.* at 835-36 (citation omitted).

203. 46 U.S.C. § 2304 (1994) (emphasis added).

204. The court, in effect, gave the *Canberra* a reward for obeying the law. By way of analogy, that is like a state trooper pulling over a motorist and giving him $100 for obeying the speed limit.

> uity will not aid .... The person who saves life on land is similarly treated, except that he may count on a paragraph in the court's opinion paying tribute to his good character.[205]

Likewise, "Life salvage, unaccompanied by property salvage, still goes unrewarded."[206] The court's attempts at novelty betray its anxiety. In effect, the court seems to say, "If masters are to be held accountable, they may as well profit from their vigilance."

The courts added another wrinkle to the interpretation of the statute in *Martinez v. Puerto Rico Marine Management*.[207] *Martinez* held that the *Indian Towing* duty of care was applicable to 46 U.S.C. § 2304. Hoyt Dixon and Denny Jones, Honduran fishermen, set sail on March 11, 1986 from Bayou La Batre, Alabama, to their native land.[208] Their boat, the *Joan J II*, was a seventy-six-foot shrimper.[209] Almost three hundred miles out to sea, the weather turned foul and the *Joan J* began taking in water from the bow.[210] Dixon and Jones, troubled by the mounting seas, turned back to Bayou La Batre, both to make repairs and to have a following sea.[211] They called Dixon's wife over the radio, letting her know that their bilge pumps were keeping up with the leak and that they had "good hopes of making it back."[212]

Then the storm swung on its axis, slamming waves into the *Joan J*'s damaged bow.[213] On the night of March 13, the *Ponce*, a 760-foot container ship on route from Puerto Rico to New Orleans, received a May Day call from the *Joan J*.[214] She proceeded toward the shrimper, which she sighted an hour later. The winds varied from 40 to 50 mph, and the seas had grown heavy and mixed. The shrimper was pounded by "heavy swells, very rough seas."[215] One of her bilge pumps had failed. The boat, however, was still under her own power and appeared to be in no immediate danger

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205. GILMORE & BLACK, *supra* note 78, at 532.
206. *Id.*
207. 755 F. Supp. 1001 (S.D. Ala. 1990).
208. *See id.* at 1002.
209. *See id.*
210. *See id.* at 1003.
211. *See id.* This would put her stern into the waves and slow the leak in the bow.
212. *Id.*
213. *See id.*
214. *See id.*
215. *Id.*

of sinking.[216]

The captain of the *Ponce* lowered his pilot ladder over the side and ordered his ship to sail to the north of the *Joan J* to block the wind and create a lee for rescue efforts.[217] The seas proved too rough, however, for the *Joan J* to come alongside the *Ponce*.[218] The captain then tied a line to a fifty-five-gallon drum to float it toward the *Joan J*, but this was swept aft of the *Ponce* because the ship was still underway in a boiling sea.[219] When advised by a crewmember that the best plan of action would be to wait for the storm to subside, the captain of the *Ponce* replied that he had a "schedule to meet."[220]

Jones and Dixon now realized that the *Joan J* was sinking, and they asked the *Ponce* to take them off.[221] The captain of the *Ponce* then ordered his men to fire a line to the *Joan J* using the Lyle gun, a rocket propelled line-throwing device.[222] He told Jones and Dixon to tie themselves to the line and he would be pull them aboard, even though the *Ponce* was still underway.[223] The two fishermen tied themselves off, and then jumped in the boiling seas.[224]

Almost as soon as Jones and Dixon hit the water, they were sucked underneath the ship. There, Dixon died.[225] It took nine crewmen over five minutes to haul him aboard, and only after they rigged a block and tackle.[226] Denny Jones had snapped free of the line when he jumped in the water.[227] Since he was wearing a life vest, it was likely that he had been swept aft of the *Ponce* and was floating astern. Nonetheless, the captain of the *Ponce* ordered the ship to proceed full speed ahead.[228] No one looked for Denny Jones, who was thrity-three years old at the time. He left behind a

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216. *See id.*
217. *See id.*
218. *See id.*
219. *See id.*
220. *Id.* at 1004.
221. *See id.* at 1003.
222. *See id.* at 1004.
223. *See id.*
224. *See id.* One crewman from the *Ponce* knew the danger of this idea because "in the midship of a ship all the current goes straight underneath the ship and goes straight to the screw." *Id.*
225. *See id.*
226. *See id.*
227. *See id.*
228. *See id.*

wife, two sons, and two daughters. He was the family's sole support.[229]

His family sued in federal court for that loss of support.[230] Under the Death on the High Seas Act,[231] the survivors of an individual can bring a cause of action for a "wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State."[232] This cause of action may be based on negligence. To support a cause of action in admiralty based on negligence, the plaintiff must show: 1) a duty owed by the defendant to the plaintiff; 2) a breach of that duty; 3) prejudice or damage sustained by the plaintiff; and 4) a causal connection between the defendant's conduct and plaintiff's damage.[233]

Here, the court found that the captain of the *Ponce* violated the duty imposed on him by 46 U.S.C. § 2304. The owners of the *Ponce* were found liable for the death of Dixon and Jones, and they had to pay over $1.2 million in damages to the fishermen's survivors.[234] Critical to the court's decision, however, was the traditional common law requirement that a rescue once begun must be carried out in good faith, as the Supreme Court outlined in *Indian Towing*. Though the court acknowledged the *Ponce*'s duty to rescue Jones and Dixon, the liability for the owners turned on the captain's abandonment of the rescue.

THE TRIUMPH OF THE COMMON LAW

In spite of the mandate of 46 U.S.C. § 2304; in spite of the Second Circuit's decision in *Warshauer v. Lloyd Sabaudo*; and in spite of repeated calls for the enactment of a law imposing a general duty to rescue, American courts hold fast to the common law tradition against affirmative duties when adjudicating admiralty claims. Even where the

229. *See id.* at 1005.

230. *See id.* at 1005-06. It is unclear how the families heard about the tragedy. It may be safe to assume that the *Ponce*'s crew notified the authorities when the ship reached port. Several crewmen testified for the plaintiffs at trial. If someone had not come forward, the sea would have swallowed the whole sad tale.

231. 46 U.S.C. §§ 761-68 (1998).

232. 46 U.S.C. §§ 761 (1998).

233. *See* Desmond v. Holland America Cruises, 1981 A.M.C. 211 (S.D.N.Y. 1981).

234. *See Martinez*, 755 F. Supp. at 1008.

statute imposes a duty to rescue, the courts hesitate to enforce that duty with liability, either civil or criminal.

Most of the admiralty cases where courts refuse to impose a duty are the progeny of *Indian Towing*. Since that plaintiff was allowed to recover against the Coast Guard, the courts have found themselves swamped with plaintiffs suing the Coast Guard for failing to save their vessels. The leading case is *Lacey v. United States*.[235] The administrator of the estate of a pilot who lost his life in Massachusetts Bay after his plane crashed sued the United States for the Coast Guard's failure to rescue him.[236] The court dismissed the claim based on the common law: "It is well settled common law that a mere bystander incurs no liability where he fails to take any action, however negligently or even intentionally, to rescue another in distress."[237] The court did, however, reinforce the *Indian Towing* requirement for due care:

> It is true that, while the common law imposes no duty to rescue, it does impose on the Good Samaritan the duty to act with due care *once he has undertaken rescue operations*. The rationale is that other would-be rescuers will rest on their oars in the expectation that effective aid is being rendered.[238]

The courts have seized on this limitation of liability. Though the cases deal with the duties of the Coast Guard, the language is broader, sweeping private vessels into the same excuse from duty. In *Frank v. United States*,[239] the Third Circuit held that

> in the absence of any duty creating a relationship the responsibility of a volunteer is strictly limited. He may be liable if the injured person has been harmed because of reliance upon some representation concerning the voluntary service. More generally, if an attempted rescue of other voluntary service is so conducted that it affirmatively injures the one in distress or worsens his position, there may be liability.[240]

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235. 98 F. Supp. 219 (D. Mass. 1951).
236. *See id.*
237. *Id.* at 220.
238. *Id.*
239. 250 F.2d 178 (3d. Cir. 1957).
240. *Id.* at 180 (citing Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955)).

The Ninth Circuit agrees with this formulation of the law of the Good Samaritan at sea, as the recent case of *Korpi v. United States*[241] makes clear. The plaintiff, Glen Korpi, was a sixty-one year old man trying to sail, by himself, from Dana Point, California, to Seattle, Washington.[242] He left his home on May 24, 1995.[243] His boat, the *Dialogue*, was a 27-foot fiberglass sloop.[244] The weather turned sour. The wind gusted to forty knots, and the seas were over six feet.[245] He was forced to use both his engine and his sail to maintain headway north.[246] Sometime before June 5, he realized that he would never make it to Seattle, so he turned to head back to Dana Point.[247] On June 5, his automatic steering failed. That forced him to man the tiller himself, which prevented him from sleeping.[248] He decided to head for Monterey Bay, but the swells had increased to ten feet, topped by six-foot waves. His engine failed.[249] He called the Coast Guard for assistance in identifying his location because he still thought he could reach the harbor safely.[250] When he passed the latitude and longitude off his Global Positioning System (GPS) to the Coast Guard, they realized that he was on the wrong side of the Monterey Peninsula, that he could not make it to the harbor, and that he had put himself between the wind and the shore, or a "lee shore."[251] With no engine, he had no way, other than by dropping anchor, to keep from running aground.[252] He dropped his anchor, which appeared to hold.[253] The Coast Guard dispatched a search-and-rescue team to save Korpi. Their forty-one-foot motor lifeboat reached him within a few hours.[254] Because of the storm, the lifeboat could not ap-

241. 961 F. Supp. 1335 (N.D. Cal. 1997), *aff'd* 145 F.3d 1338, No. 97-15704, 1998 WL 231207 (9th Cir. Apr. 28, 1998).
242. *See id.* at 1337.
243. *See id.*
244. *See id.*
245. *See id.* at 1338.
246. *See id.*
247. *See id.*
248. *See id.*
249. *See id.*
250. *See id.*
251. *See id.* at 1339.
252. *See id.*
253. *See id.* at 1340.
254. *See id.*

proach the *Dialogue* without colliding.[255] The yacht was swinging wildly on the anchor chain. The coxswain of the lifeboat told Korpi to cut his anchor line, which would calm the swinging of the yacht and allow the lifeboat to approach.[256] The crew of the lifeboat tossed him a heaving line to which a towing line was attached.[257] Though he caught the heaving line, he was unable to pull the towing line aboard. He was too tired from lack of sleep and from battling the storm.[258] He tied the heaving line to his bow cleat.[259] Afraid of the rocks only forty-four feet away, the coxswain of the lifeboat began towing the *Dialogue*, hoping that the thin heaving line would not part. It did.[260] The *Dialogue* smashed against the rocks.[261] A Coast Guard rescue helicopter, which had been circling the area, swept in and scooped Korpi from the water. It deposited him on the nearby shore.[262] The *Dialogue* was destroyed.[263]

Korpi sued the United States for the alleged negligence of the Coast Guard in its rescue attempt.[264] The parties agreed to a bench trial.[265] Korpi lost.[266] As Chief Magistrate Judge Langford said, "The fact is, thanks to the Coast Guard, Mr. Korpi is alive, he suffered only minor injuries, and he is very lucky that they got to him as quickly as they did."[267]

What is most important about this decision, however, is that it reaffirms, in no uncertain terms, the common law prohibition of affirmative duties, despite a statute to the contrary:

> A private party has no affirmative duty to rescue a vessel or per-

255. *See id.* at 1343.
256. *See id.* at 1344.
257. *See id.*
258. *See id.* at 1345.
259. *See id.* The full story of this fiasco is even more pathetic. At some point during the rescue, Korpi's eyeglasses were lost, rendering him almost blind. *See id.* at 1337-38. Even if the weather had improved, he could not have reached port safely—he could not see where he was going. This case could be used as a primer on what to avoid when sailing alone.
260. *See id.*
261. *See id.*
262. *See id.*
263. *See id.*
264. *See id.* at 1337.
265. *See id.*
266. *See id.* at 1350.
267. *Id.* at 1348.

> son in distress.[268] The Coast Guard therefore, also has no affirmative duty to render aid to a vessel or person in distress .... The Coast Guard is not held to any higher standard of care in its rescue operations than a private person .... Although the Coast Guard is under no affirmative duty to render aid to a person or vessel on the high seas, ... once having done so, it is held to the same standard of care as private persons.[269]

On appeal, the Ninth Circuit Court of Appeals agreed with Judge Langford. In a memorandum opinion, the Court wrote, "In a case of rescue at sea, 'a rescuer will be held liable only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in performing the rescue.' "[270] That leaves the rescuer who does nothing for the victim absolved of any responsibility, in open derogation of the statute imposing a criminal penalty on his refusal to help.

The court's conclusion in *Korpi* sounds chillingly like the words of a British admiralty court opinion from 1908, two years before the Brussels Convention on Salvage:

> This moral obligation applies on land as well as on sea, and its force as a moral obligation is only greater in the case of sea perils because these are in the general case more claimant in their call for aid because of their exceptionally dangerous character. But this is an obligation which applies not to seafaring matters only, but to all circumstances in which the citizen can by timely assistance save others from danger; even that obligation can hardly be held to exist as regards saving of corporeal objects. It applies only to persons. *But whatever be the extent of it, it is plainly not an obligation in law. Its non-fulfillment cannot be visited with either public official censure or give claim in civil suit in respect of failure.*[271]

The Brussels Salvage Convention and the Salvage Act of 1912 were meant to make rescue an obligation in law. But as the Ninth Circuit makes clear in *Korpi*, our law is

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268. *Id.* at 1346 (citing Basic Boats, Inc. v. U.S., 352 F.Supp 44, 48 (E.D.Va. 1972); Lacey v. U.S., 98 F.Supp. 219, 220 (D. Mass.1951); Frank v. U.S., 250 F.2d 178, 180 (3d Cir. 1957); Bunting v. U.S., 884 F.2d 1143, 1147 (9th Cir. 1989)).

269. *Id.* (citations omitted).

270. Korpi v. United States, 145 F.3d 1338, No. 97-15704, 1998 WL 231207, at *1 (9th Cir. Apr. 28, 1998) (quoting Berg v. Chevron U.S.A., Inc., 759 F.2d 1425, 1430 (9th Cir. 1985)).

271. Clam Steam Trawling Co. v. Aberdeen Steam Trawling and Fishing Co., 1908 S.C. 651, 657 (emphasis added).

the same as it was in 1908. There is no duty to rescue those in danger at sea.

CONCLUSION

Thomas Babington Macaulay, a member of the 1837 commission responsible for revising the Indian Penal Code, was one of the first to recognize that there were problems with enforcing positive duties generally and Good Samaritanism in particular. Macaulay wrote:

> It is true that none but a very depraved man would suffer another to be drowned when he might prevent it with a word. But if we punish such a man, where are we to stop? How much exertion are we to require? Is a person to be a murderer if he does not go fifty yards through the sun of Bengal at noon in May in order to caution a traveler against a swollen river?[272]

Oliver Wendell Holmes Jr. once said that "hard cases make bad law."[273] No one can argue that what happened to the greatest ship afloat in the icy waters of the North Atlantic on the night of April 15, 1912, was a hard case. Does that make the law that followed the sinking of the *Titanic* a bad law? Is it wrong to have a legal duty to help those in need, when such aid could be easily given?

Macaulay's objection is a real one. Where are we to draw the line? The Supreme Court tried to draw a line with *Indian Towing*: a duty once assumed must be continued. But that has led to a flood of lawsuits against the Coast Guard, and it has prompted the courts to deny any duty owed to anyone whatsoever. That seems especially unfortunate in light of a statute to the contrary.

Another objection, and perhaps the most important, is the lack of an historical tradition in this country (and in England) for this sort of imposition of duty. The attempt by the Salvage Commission to graft this idea onto limbs of American jurisprudence was bound to fail. We are too devoted to the common law and too zealous in defense of our liberty to allow this foreign concept to flower here.[274]

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272. GOODMAN, *supra* note 45, at 102.

273. Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904).

274. Witness the outcry over laws requiring seatbelts, airbags, bicycle helmets, and other restrictions on our "freedom." Even the celebrated final episode of *Seinfeld* ridiculed a Good Samaritan law.

That may not be all bad. One of the first Good Samaritan laws was passed in France in 1941 under less than noble circumstances.[275] A German officer had been shot by the Resistance.[276] His cries for help as he lay in the street went unanswered, and he died from his wounds.[277] In reprisal, the Germans took fifty hostages from the village and executed them.[278] The Vichy government then passed a statute obliging citizens to intervene for the prevention of crimes and the rescue of persons in danger.[279] The rule tended to protect the Nazis by punishing those who did not come to their aid.[280]

The answer may not be to impose a duty by fiat, but an answer must be found. This problem of rescue is not merely an academic question. In 1989, 160 Vietnamese refugees, crowded onto a tiny boat, floated into the shipping lanes in the South China Sea.[281] As the huge *Nissei Maru* tanker slowed to avoid collision and to offer help, the refugees' boat caught the wake of the 484,000-ton ship and capsized.[282] The tanker called for help from the three other ships standing within sight of the accident.[283] Not one responded, and over 130 people, mostly women and children, lost their lives.[284] It was said that ship owners told their captains who crossed the South China Sea not to pick up refugees, because of the additional costs and administrative headaches.[285]

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275. *See* Andre Tunc, *The Volunteer and the Good Samaritan, in* THE GOOD SAMARITAN AND THE LAW 46 (James M. Ratcliffe, ed., 1966).

276. *See id.*

277. *See id.*

278. *See id.*

279. *See id.*

280. It is interesting to note that this law is still on the book in France. There was some movement to charge the *paparazzi* for its violation following the death of Diana, Princess of Wales. The *paparazzi* were alleged to have allowed Diana and the other passengers to die while they snapped photographs. To date, no charges against the photographers have been filed. *See generally Talk of the Nation: Good Samaritan Laws* (National Public Radio broadcast, October 10, 1998).

281. *See* David E. Sanger, *Japanese Say 3 Ships Refused to Aid Boat People*, N.Y. TIMES, Mar. 24, 1989, at A6.

282. *See id.*

283. *See id.*

284. *See id.*

285. *See* Henry Kamm, *More Ships Ignoring Vietnam's Refugees*, N.Y. TIMES, Aug. 25, 1977, at A7. One captain, Edgar Silverio, worried that he might lose his job because he stopped to pick up refugees. His owners praised him for

Perhaps the answer may be found in the actions of the United States Navy. Captain Alexander G. Balian, commander of the *U.S.S. Dubuque*, encountered a similar boatload of refugees in the South China Sea.[286] He offered them food and medicine but refused to take them on board.[287] Later, fifty-eight of the 110 refugees died of starvation and dehydration after drifting at sea for more than a month.[288] No criminal charges were filed against Captain Balian, and he did not face court martial.[289] Instead, he was relieved of his command. Losing one's ship is considered the Navy's worst ignominy, and it ended Captain Balian's career. From that incident on, there have been no accusations of U.S. Navy ships ignoring the needs of refugees lost at sea.

People die at sea for want of a Good Samaritan. There is no evidence, however, that the statute encourages captains to rescue those in danger. On the contrary, there is evidence that the law is not obeyed. There is also evidence that the law is not enforced. A law that is not enforced is worse than no law at all. It cannot be relied upon, and it will not be obeyed.

We should not expect the law to save those in peril on the seas. As Justice Holmes said,

> If you want to know the law and nothing else you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[290]

The law cannot be the foundation of our morality.

In the middle of the ocean, there are no courts, there are no judges, and there are no juries. In the middle of the ocean, there is no law. There is only the internal tribunal of conscience, and it is there that we must find the duty to

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his altruism, but told him not to let it happen again. *See* Henry Kamm, *Captain Who Saved 49 Vietnamese Fears for Job*, N.Y. TIMES, June 23, 1978, at A3.

286. *See* John Cushman, Jr., *Skipper Rejected Help With Refugees, Navy Says*, N.Y. TIMES, Aug. 26, 1988, at A3.

287. *See id.*

288. *See id.*

289. *See* David E. Sanger, *Navy Removes Captain Over Japan Shelling*, N.Y. TIMES, Nov. 22, 1988, at A5.

290. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

rescue those in danger of being lost at sea. As Maimonides said, "[I]f one destroys the life of a single [person], it is regarded as though he destroyed the whole world, and if one preserves the life of a single [person], it is regarded as though he preserved the whole world."[291]

291. MAIMONIDES, THE CODE OF MAIMONIDES, THE BOOK OF TORTS 198 (Hyman Klein M.A. trans., 1954).